

The Commonwealth of Massachusetts

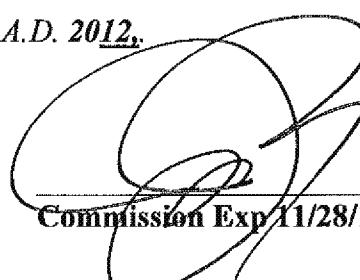
Suffolk, ss.

To Keeper of Records - Comm. of MA Dept.
of Public Health William A. Hinton State
Lab Institute
350 South St.
Jamaica Plain, MA greetings.

You are hereby commanded, in the name of The Commonwealth of Massachusetts, to appear before the Roxbury District Court, 85 Warren St., Holden at Roxbury, within and for the county of Suffolk, on the 6th, day of September, 2012, at 9:00 A.M., o'clock in the fore, noon, and from day to day thereafter, until the action hereinafter named is heard by said Court, to give evidence of what you know relating to an action of Criminal Hearing, then and there to be heard and tried between Commonwealth of Massachusetts, Plaintiff, and [REDACTED] Defendant, Docket [REDACTED]
[REDACTED], and you are required to bring with you any and all employment/disciplinary records of State chemist Annie Dookhan and any records which exist with respect to any investigation conducted upon her. (See attached Court Order)., *See attached Court Order**, *Inquires to Atty. Richard Doyle (@ 617-864-1390., *Subpoena issued at the request of the defendant, , , , , .

Hereof fail not, as you will answer your default under the pains and penalties in the law in that behalf made and provided.

Dated at Boston the 31st, day of July, A.D. 2012,


Commission Exp 11/28/14 Notary Public

A TRUE COPY, ATTEST

8/1/12
Oaryable, Boston Ma. Date

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

BOSTON MUNICIPAL COURT
ROXBURY DIVISION
DOCKET NO. [REDACTED]

COMMONWEALTH

-v-

DECISION ON DEFENDANT'S MOTION TO COMPEL

Defendant [REDACTED] has been charged with various charges of distributing a Class A substance, heroin, on December 20, 2010. AD, a chemist previously employed by the Commonwealth of Massachusetts, Department of Public Health ("DPH"), tested the substance in question on March 26, 2011 and the substance in question was returned to the Boston Police Department (BPD) on April 5, 2011. Defendant's counsel, through a "Commonwealth's Discovery Notice" in Commonwealth v. Fazio, Middlesex Superior Court No. 2010-1252 (March 30, 2012), has learned that "state chemist AD breached the chain-of-custody protocol of the [DPH] William A. Hinton State Laboratory Institute in June 2011."¹ See Exhibit A attached to Defendant's Motion. Defendant's counsel has also learned that AD is no longer employed as a DPH state chemist.

Defendant has moved, pursuant to Mass. R. Civ. P. 17, this Court to compel DPH

[T]o produce documentary evidence and objects (specifically, any and all employment records and disciplinary records of [AD] and] any records which exist with respect to any and all investigations conducted upon [AD] pursuant to subpoena duces tecum.

See Defendant's Motion.

¹ According to the "Commonwealth's Motion in Opposition," the breach occurred on June 14, 2011 and was discovered on June 16, 2011.

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The Commonwealth has filed two oppositions to Defendant's Motion, one by the Office of the Attorney General on behalf of DPH and the other by the Office of the District Attorney.

DISCUSSION

The question of whether or not the substance in question is a class A substance has been preserved for trial. Among the triable factual issues relating to that question is whether or not the chain of custody of the substance was strictly preserved at all times between the time the substance was seized by the police and the time of trial. The fact that AD breached the DPH chain-of-custody protocol in June 2011 at the very least provides a good faith, reasonable belief that AD may have also breached that protocol on other occasions during her employment. It also provides a good faith, reasonable belief that AD may have breached that protocol when AD had the substance under control for testing purposes on March 26, 2011, or when the substance was reportedly returned to BPD on April 5, 2011. Therefore, any documents or other evidence suggesting that AD breached the protocol (or other similar protocols or rules during her employment) could be relevant to the Defendant's defense and possibly admissible at trial.

Defendant's request is not a general fishing expedition.

DPH also argues that because AD "was not investigated or disciplined with respect to the drugs seized in this case . . . or at any time before or while DPH had custody of the drugs in this case," DPH has no relevant documents. Having found that such documents could be relevant and perhaps admissible at trial, and also that the information is not available from any other source, this Court cannot allow DPH to substitute its unilateral determination of relevance to trump this Court's decisions on relevance and admissibility. This Court further finds that all of the requirements under Commonwealth v. Lampron, 441 Mass. 265, 270 (2004) (relevance,

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admissibility, necessity, and specificity) have been met.

Similarly, DPH's conclusory representations (e.g., the narcotics will be retested, the laboratory's safety mechanisms prevented AD's error from going unnoticed, etc.) or the Commonwealth's undocumented assertions (the breach was a one-time incident and not part of a recurring pattern of conduct, there's no evidence that the integrity of the drugs retrieved on June 14, 2011 had been affected, etc.), with all respect to the Commonwealth, DPH, and their attorneys, are not a meaningful substitute for the Defendant's examination of relevant documents, including employment records and investigatory records/reports.

The Commonwealth's citation of Commonwealth v. Cruz, 53 Mass. App. Ct. 393, 407 (2001) is premature. At issue in Cruz was whether or not unrelated mistakes by expert witnesses were admissible at trial, not whether or not documents relating to such mistakes should be produced pursuant to Mass. R. Crim. P. 17.

After argument, there appears to be no question that DPH did conduct an investigation of AD and there is no question that the report of that investigation should be released to the Defendant. DPH argues that the public records law exempts disclosure of any DPH investigation of its employee AD. That argument, and its citation of Wakefield Teachers Ass'n v. School Comm., 431 Mass. 792, 798 (2000), are not well taken. Unlike the situation in Wakefield, the Defendant is not attempting to publicize generally the DPH report of its investigation of AD. Instead, the Defendant is seeking the report to preserve and enhance his constitutional right to a fair trial. Any concerns by DPH about general publication of that report, or any relevant underlying documents, can be easily addressed by a protective order limiting the circulation, at least prior to trial, of that report and those documents, to Defendant's counsel and those who are

employed by him on behalf of the Defendant.

In terms of DPH's privacy argument, having balanced the claimed invasion of privacy of AD against the interest to the Defendant of the disclosure of the information, this Court finds that the Defendant's interests vastly outweigh the privacy concerns of AD. This is especially true if the Defendant and DPH enter into a protective order. The Court acknowledges that release of this information may pose a danger to the privacy of other DPH/Commonwealth employees. Again, any such concerns may be addressed through the drafting of a protective order.

Finally, this Court shall not allow general, unfocused, unspecified assertions that furnishing the requested documents (essentially AD's employment and disciplinary records, as well as the report of investigation and related documents) may violate the attorney-client and/or the attorney work product privileges to exempt disclosure of all such documents.

Therefore, Defendant's Motion to Compel is ALLOWED. It is this Court's Order that

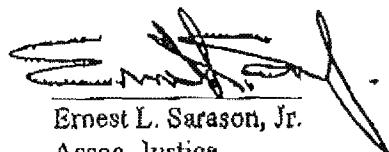
1. DPH and the Commonwealth shall produce, no later than 30 days from the date of this Order, all documents requested by the Defendant, including but not limited to AD's employment and disciplinary records, DPH's report of its investigation of AD, and related documents.
2. DPH, the Commonwealth, and the Defendant's attorney shall enter into a protective order that will protect the privacy of DPH employees.
3. AD's employment and disciplinary records and DPH's report of its investigation of AD are not generally exempt from production pursuant to the attorney-client and/or the attorney work product privileges and shall be produced. Any specific assertion that production of any documents (or any portion of such documents) *related* to the report of the investigation, or of any other document, would violate such privileges shall be only be made if each assertion is

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accompanied by a detailed written statement setting forth exactly the nature of the privilege claimed and why production of that document would violate such privilege.

SO ORDERED.


Ernest L. Sarason, Jr.
Assoc. Justice

Dated: July 24, 2012